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Supreme Court, U.S.
FILED

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NO 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RANDALL MC ARTY,
Petitioner

V.

LARRY NORRIS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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125 pp

QUESTIONS PRESENTED

1. Whether automatic review by operation of law in Arkansas cases involving sentences of life imprisonment, life without parole, or death under Arkansas Code Annotated 16-91-113(a) effectively preserved Petitioner's issues on federal habeas petition.

2. Whether Petitioner, who was incarcerated at the time, was required to fire an ineffective attorney hired for presentation of his State postconviction petition and hire other counsel or proceed *pro se*, in order to preserve his claims of ineffective assistance of counsel as regards the attorney representing him at trial.

3. Whether the failure of trial counsel to even interview a witness who not only had been located in the next room when the events occurred, but who also made statements to the police tending to negate the critical elements of premeditation and deliberation, amounted to ineffective assistance of counsel.

4. Whether Petitioner should have been expected to take extra-ordinary steps of making his own record in open court when his attorney on direct appeal and post-conviction refused to raise certain issues that are now critical to his opportunity for habeas relief.

5. Whether Petitioner has been denied fundamental fairness, effective representation of counsel, and due process of law under the Fifth, Sixth and Fourteenth Amendments.

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I. OPINIONS BELOW

A. Direct Appeal: McArty v. State, 316 Ark 35, 871 SW2d 346 (1994). Affirmed.

B. Post-Conviction, Rule 37 Petition. CR-92-111, Circuit Court of Clark County, Arkansas. Denied. June 14, 1994.

C. Post-Conviction Rule 37 Appeal, McArty v. State, CR 94-1010, April 10, 1995. (Unpublished Per Curiam). Affirmed

D. Magistrate's Findings and Recommendations re: Petition for Writ of Habeas Corpus, McArty v. Norris, PB-C-96-53 , June 28, 1996. Recommends Denial of Writ of Habeas Corpus.

E. Unpublished Judgment and Order of U.S. District Court, Eastern District of Arkansas, August 29, 1996. Adopts Findings and Recommendations in their entirety. Writ denied. Case dismissed.

F. Unpublished Judgment United States Court of Appeals for the Eighth Circuit, McArty v. Norris, 96-3551EAPB, denying summarily certificate of appealability (probable cause).

G. Unpublished Judgment of United States Court of Appeals for the Eighth Circuit, McArty v. Norris, No. 96-3551EAPB, denying Petition for Rehearing and Suggestion of Rehearing En Banc, March 20, 1997.

II. JURISDICTIONAL PREDICATES

A. Review is sought of the summary denial of a Writ of Habeas

Corpus, based upon the Findings and Recommendations of the United States Magistrate, presented the 28th day of June, 1996, and adopted and entered on August 29, 1996, in their entirety as the judgment of the District Court; as well as the summary denial of a certificate of appealability on both hearing and rehearing by the Court of Appeals for the Eighth Circuit.

B. The Order of the Eighth Circuit denying a rehearing entered March 20, 1997. No extensions for the filing Petition for Certiorari.

C. Rules 12.5 and 29.4(b) and (c) inapplicable to this Petition.

D. Jurisdiction by 28 USC Section 2254 and 28 USC 1254(1).

III. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES AT ISSUE

A. U.S. Constitution, Amendments V, VI and XIV, Sect. 1;

B. Arkansas Code Annotated, Section 16-91-113

C. Arkansas Supreme Court Rule 4-3(h)

D. Rule 37.1, Arkansas Rules of Criminal Procedure

IV. STATEMENT OF THE CASE

A. Facts:

Petitioner, Randall Thomas McArty, was convicted violation of Arkansas Code Annotated[1] 5-10-102, Murder in the First Degree in the death of Teresa Chamberlain which occurred July 31, 1992 at around 10:30 P.M. and sentenced to life imprisonment. Petitioner offered the affirmative defense of self-defense. Petitioner was represented at trial by the late Travis Mathis, Sr. During the pendency of the case, Bobby Wayne Sanders, was defeated for Prosecutor by Henry Morgan. It was Morgan who tried the case against Petitioner.

Teresa Chamberlain and her child, Amy, co-habited with Petitioner at Gurdon, Arkansas, At the time of the events, Daniel Blasingame, was also in the home. Teresa and Petitioner had a stormy relationship that had sometimes involved physical violence. It was undisputed that Teresa had recently intentionally scalded

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[1]Hereinafter abbreviated "ACA".

Petitioner's foot with hot food, for example.

On the morning of July 31, 1992, Blasingame was working on Chamberlain's automobile, which was non-functional. . Petitioner had rented a car for transportation. Blasingame and Chamberlain decided to take a trip in this car to Okalona some miles distant, in order to visit one Lennie Richards. Amy Chamberlain accompanied them.

When Blasingame and Chamberlain did not return for several hours, Petitioner contacted his brother who drove him to to Richards' house. An altercation ensued between Teresa, Richards and Petitioner. Richards threatened to kill Petitioner. Amy witnessed this altercation and noted in her police statement that her mother had the blue rental car in Okalona, which, in the melee, Petitioner did succeed in retrieving. Richards' police statement put this time at close to 7:00 P.M.

The State put on Marcus Bragg who testified that he had a conversation with Petitioner on the afternoon of July 31, 1992,

between 5:00 and 6:00 P.M. Petitioner, in his blue car, had purportedly stopped and flagged Bragg down on "the last overpass [over I-30] before you get to Arkadelphia" (the same being almost 30 miles from Okalona). During this conversation Petitioner was alleged to have discussed his intent to kill Teresa. Petitioner denied this conversation occurred. It was undisputed, that Petitioner had bought a box of buckshot on the day in question in the late afternoon of July 31, 1992. Teresa, Amy, and Blasingame returned home after getting a ride with a friend. Teresa and Blasingame reportedly went to their respective rooms . Amy went to sleep on a couch just outside the kitchen door. When Petitioner returned that night, he became concerned that someone was in the house--supposing Chamberlain and Blasingame to still be in Okolona. He retrieved a single-barrel, break open shotgun from his car and loaded it with buckshot. When he switched on the kitchen light, Teresa Chamberlain was in the kitchen. The argument erupted again and Teresa picked up a butcher's knife from the table and attacked him. Petitioner fired

once, inflicting a fatal wound. Blasingame stated that he heard a call for help, immediately came to the kitchen, and found Petitioner holding the shotgun, and noted that McArty stated he was going for help, whereupon he left the residence. Petitioner placed the call to the authorities. In her police statement, Amy Chamberlain stated that she heard her mother open a kitchen drawer just before the shooting, that the decedent and Petitioner were arguing for several minutes and then she heard the shot. She saw her mother lying on the floor with a butcher's knife in her hand. She went to the neighbor's home and, according to their testimony, stated that her mother had attacked Petitioner with a knife. Petitioner was of the opinion that Amy Chamberlain should be called. Mathis chose not to call the child. Instead he utilized the testimony of the neighbor, Tommy McMillan, to get the statement in under the "excited utterance" exception to the hearsay rule. The State put on evidence of scientific nature regarding blood spatter and fingerprints, and of the officers who responded to the call, which suggested that Petitioner had placed the

knife in the decedent's hand, post-mortem and that he had shot her from the door to the outside, with an inference that this was by ambush. On this evidence, the jury found Petitioner guilty of First Degree Murder, sentencing him to life imprisonment. The instructions given the jury erroneously contained the intent portion of Capital Felony Murder, ACA 5-10-101.

Shortly after trial, Patsy Sorrells, Petitioner's mother, encountered the former Prosecutor, Sanders, by a chance. Sanders asked Ms. Sorrells why Petitioner had declined his offer of a negotiated plea to Second Degree Murder, with a term of 20 years. Such offer had never been communicated to Petitioner by his attorney, Mathis, although Petitioner had asked about the possibility of a negotiated plea. Petitioner had engaged the services of William McArthur to file first a direct appeal and subsequently to file a petition for relief under Rule 37 of the Arkansas Rules of Criminal Procedure based upon ineffective assistance of counsel. McArthur raised three issues: 1. That Travis Mathis failed to call witnesses

critical to the case; 2. That Mathis failed to have Petitioner present for a critical hearing at which jury instructions, among other issues, were discussed and finalized; and 3. That Mathis had failed to communicate Prosecutor Sander's offer of a negotiated plea to Petitioner. Petitioner had also instructed McArthur by certified mail to raise the issue of the jury instructions and several other issues.

At hearing on the Rule 37 Petition, McArty testified that he had not been at the hearing in question but had been working. Evidence was presented to this point. Neither the prosecutor nor an employee of his office could say for sure if Petitioner had been present for the hearing on motions and jury instructions. Sanders took the stand and stated that he had verbally explored a negotiated plea only to be rebuffed by Mathis out-of-hand. Mathis would consider no agreement that did not free his client. Sanders stated that the verbal offer had communicated a desire to effectuate a negotiated plea to Second Degree Murder and 20 years. Sanders was concerned about the statements given by Amy Chamberlain and their potential

helpfulness to the Defense. It was undisputed that Sanders looked unsuccessfully for a written agreement in the files after his conversation with Ms. Sorrells. Petitioner McArty testified that no such offer was communicated. Mathis agreed that no such offer was communicated because, he stated, none was made. Normally such offers were to be made in writing, although Mathis did acknowledge one oral plea agreement in a case involving Sanders.

Mathis made several personal attacks against Sorrells and Sanders during his time on the stand, expressing irritation with them. Morgan confirmed that it was policy to put such agreements in writing, a policy formulated by the presiding judge, Judge Arnold, when he had formerly been Prosecuting Attorney prior to Sanders' tenure. On cross-examination Mathis stated categorically on the stand that he "certainly did not" interview Amy Chamberlain nor even attempt to do so. He stated his familiarity with the police reports and felt that all the child's testimony could accomplish was to introduce the excited utterance regarding the knife. He made no note of the

potential for diminishing the element of intent by negation of Bragg's testimony or other elements of the State's case. With regard to the presence of Petitioner at the critical hearing, Mathis was the only witness who stated categorically that Petitioner had been present.

On this record, Petitioner's claims and evidence were deemed wholly incredible and relief denied. Denial was affirmed by the Arkansas Supreme Court. A Petition for Habeas Corpus was brought raising all of the issues that Petitioner had sought to raise at the Rule 37 hearing. These were: 1. Petitioner was not present at a critical pre-trial hearing in violation of his rights; 2. Mathis was ineffective for failing to advise Petitioner of the oral plea offer and rejecting same out of hand without authority to do so;3. In-effectiveness for failure to interview and call critical witnesses; 4. In-effectiveness for failure to challenge a jury instruction consistent with capital murder rather than first degree murder; 5. Ineffectiveness for failure to object to a juror for cause; 6. Ineffectiveness for failure to object during closing arguments to statements unsupported by the

evidence; 7. Ineffectiveness for failure to call a blood spatter expert to negate the State's evidence in this regard. The Magistrate found that grounds 1 through 3 were fully and fairly heard in State Court and that grounds 4 through 7 were procedurally barred, even though Petitioner could demonstrate that at least some of them had been raised with McArthur for purposes of post-conviction relief. Petitioner had no guarantee of effectiveness of counsel on post-conviction proceedings. The District Court adopted the Magistrate's Findings and Recommendations in their entirety, dismissing the Petition. The Court of Appeals summarily denied a certificate of appealability (probable cause) both on hearing and rehearing. This Petition for Writ of Certiorari ensued.

B. Jurisdiction of the Federal Courts:

Federal Court jurisdiction was invoked in the District Court pursuant to 28 USC Section 2254. Appeal was taken to the Court of Appeals pursuant to 28 USC Section 1291 and from there to this Court pursuant to 28 USC Section 1254(1).

V. ARGUMENT AND REASONS FOR GRANTING PETITION FOR CERTIORARI

A. INTRODUCTION:

Essentially this is a simple case. Petitioner, Randall Thomas McArty, shot and killed his girlfriend, Teresa Chamberlain, in their home. He claimed self-defense and that Teresa had attacked him with a butcher knife. Asleep in adjoining room was Teresa's 9 year old daughter, Amy Chamberlain. In her police statements, which are included in the Appendix herewith, Amy gave statements indicating that the decedent had, indeed, attacked Petitioner with a knife, but more than this, that negated the testimony of Marcus Bragg Petitioner elsewhere and by tending to disprove inferences drawn by the experts in the case.

It is known and undisputed that Petitioner bought five No. 1 buckshot shells , in Gurdon at around five o'clock. Amy places the automobile McArty had rented in Okolona around 7:00 P.M. (When taken with Lennie Richard's statement). Petitioner had no other transportation according to Amy. However, the State's major

witness with regard to the issue of intent, Marcus Bragg, stated that he had met with McArty and had a conversation with him at 5:00 P.M. on the outskirts of Arkadelphia, some 27.5 miles away from Okolona and heading in the wrong direction. Bragg said that McArty was driving the blue car at the time he met with him. McArty allegedly stated his intention to kill Teresa Chamberlain during this conversation. Amy Chamberlain also noted that just before the shooting she had heard the a drawer containing silverware opened. The decedent and McArty argued for several minutes. Teresa was said by Amy to have a knife in her hand. Amy did not witness the shooting itself, but was immediately on the scene afterwards, having had to walk less than 10 feet to arrive on the scene.

Trial counsel, the late Travis Mathis, Sr., by his own admission did not even attempt to interview Amy as to what she could contribute, relying instead on the "excited utterance" of the child at the time as related to the knife and getting that in through hearsay. It was as if trial counsel discovered a valuable antique box

with a diamond inside and became so enamored of the jewel that he trashed the box. Amy had more to tell than this one thing.

Moreover, the former prosecutor, B.W. Sanders, volunteered to the mother of the Petitioner during a chance meeting after trial that he had orally offered Mathis a plea bargain. Yet this offer was undisputedly never communicated to Petitioner. Mathis stated that this was because it never happened and all reviewing courts have simply bought this explanation--leaving one to wonder why someone of sufficient standing in the community to be elected prosecuting attorney would make such a gratuitous statement that was untrue *and* then perjure himself by repeating the same statement under oath. Again, the State court seized on the issue of whether or not the offer had been in writing and all reviewing Courts have taken the position that this irrelevancy trumps the fact that Sanders stated that Mathis rejected the offer out of hand. Finally, it is clear from reviewing the jury instructions given, that the instruction for Capital Murder rather than First Degree Murder (which is a crime of less

culpable *mens rea* in Arkansas) was given. Although instructed to do so, the appeal/post-conviction attorney, William C. McArthur failed to raise this. The State alleged procedural default and the Magistrate found that such had occurred. The District Court picked up on this and adopted this finding and the Court of Appeals for the Eighth Circuit refused a certificate of "appealability" (probable cause), in conflict with both the holding of this Court in Lozada v. Deeds, 498 U.S. 430 (1991) and with the Arkansas Supreme Court's vision of its role under ACA 16-91-113 and Arkansas Supreme Court Rule 4-3(h). As stated in Franz v. State, 296 Ark 181, 754 SW2d 839 (1988) that vision is "that this Court must make its own examination of the record when an appeal is taken" from a sentence of death, life imprisonment without parole, or to life imprisonment--the latter being McArty's sentence. Mathis' conduct violated the objective standard of Strickland v. Washington, 466 U.S. 668 (1984)

Seven (7) grounds were raised in District Court illustrate that Petitioner has suffered from ineffective assistance of counsel at trial

and on appeal/post-conviction. As result of that ineffective assistance, Petitioner, a person with no serious previous legal problems, was incarcerated for the rest of his natural life and will remain so unless this Court chooses to review his case and to act. He has yet to receive a "full and fair" hearing on *the entire record* of his claims of ineffective assistance, and as such both his Sixth and Fourteenth Amendment right to a fair trial with effective assistance of counsel and his Fifth and Fourteenth Amendment rights to due process of law and equal protection have been abridged.

B. PRESERVATION OF GROUNDS FOR HABEAS RELIEF:

The Recommendations and Findings of the Magistrate are at issue herein because they have been adopted, whole cloth, by all subsequent Federal Courts to date. The Magistrate held that several of the grounds were procedurally defaulted under the holding in Wainwright v. Sykes, 433 US 72 (1977). In the original petition, seven grounds for relief were stated, all of which are tinged or tainted by the "ineffective assistance" rendered by trial counsel. In McArty

v. State, 315 Ark 35 (1994) the Supreme Court noted that it had reviewed the entire record in accordance with ACA 16-91-113 and Rule 4-3(h) of the AR. Sup. Ct. Rules. These provisions provide for automatic review of all outstanding issues on any case involving life imprisonment such as Petitioner McArty received. The plain language of the Statute, ACA 16-91-113(3) says that if there is no opportunity to object, a Defendant is not prejudiced by failing to do so (contrary to the Magistrate's holding.) If so, grounds four, six and possibly seven should have leaped out for review from the record.

Ground four dealt with the improper jury instruction. Discussions of the jury instructions were memorialized in the record. (T-87 et seq.) This occurred at a hearing at which Petitioner claims he was not present and which, indeed, only his trial attorney--in the midst of a proceeding calling his assistance as counsel into question--seemed to have clear memory of him being there. The actual instruction given appears later (T-648) Despite the fact that the First

Degree statute says nothing about the premeditated and deliberated purpose, the Arkansas Court said nothing about this. Yet, the decision states that no issue prejudicial to Petitioner existed. Ground 6 dealt with Mathis failure to object on closing argument. Statements well outside the evidence were made without objection. The jury was asked to consider "first degree murder cause he shot her premeditated with intent to do it and with a plan to do it." (T-705) and to send McArty to prison "and he'll go have a productive life over there working, something he hasn't done." (Id) This statement is categorically false as the evidence did not show Petitioner was a n'er-do-well and in need of prison to make his life "productive". He was not.

Ground 7 is admittedly weaker. However, the fact that Petitioner's attorney was vastly ineffective in trying to counter the testimony of the "blood spatter" expert without the services of a similar expert is all too apparent from the record.

In the Eighth Circuit, review of legal issues on a Petition for Habeas is *de novo*. There is no presumption of the correctness of a

legal analysis. McIntyre v. Caspari, 35 F3d 338 (8th Cir. 1994) Thus, the Supreme Court of Arkansas' conclusions as to these matters were incorrect--but review of them was preserved as a matter of law. More over Petitioner has shown cause and prejudice. Petitioner was able to demonstrate to the Magistrate's satisfaction that McArthur had received a correspondence from Petitioner indicating that he wanted these matters raised, but that they were not. The Magistrate's answer: Fire your lawyer and proceed *pro se*. Even the Magistrate noted that this was a "harsh" result. One wonders, as a practical matter, what more an untrained layperson could have done to raise a ground important to him. Should he have stood in open Court and shouted, "Hey, wait a minute. You're not asking what I wanted you to. You're fired"? One seriously doubts that the Court would have countenanced such an interruption. Petitioner pressed his attorney to raise these matters, but to no avail.

Ineffective assistance of counsel, as the Magistrate noted, is a recognized reason for allowing the raising of a matter that would

otherwise be procedurally barred. Murray v. Carrier, 477 U.S. 478 (1976); Coleman v. Thompson, 501 US 722 at 754 (1991). Normally all such claims must be raised in State Court--the claims of ineffective assistance, including several non-defaulted claims, were brought in general terms. They should have supported the other instances of ineffective assistance set out herein and before the Magistrate.

C. CLEAR INSTANCES OF INEFFECTIVE ASSISTANCE:

1. Failure to Attempt to Interview Amy Chamberlain:

Amy Chamberlain was nine years, eight months old at the time of the incident in question. She had gone with her mother to Okolona. She had witnessed the altercation that arose in that town over the automobile. (Another participant in that matter, Lennie Richards--who was also apparently not contacted--stated that this occurred near 7:00 P.M.) Amy stated that Petitioner was without the blue rental vehicle because she and her mother had driven it to Okolona, where Petitioner retrieved it. Some 27.5 miles away is the

on-ramp to Interstate 30 just prior to Arkadelphia. It was there, going east--or the opposite way from Okolona—that the State's witness, Marcus Bragg, testified that Petitioner made his threat to kill the decedent. Bragg's testimony thus puts petitioner in his blue car and going the opposite direction, some two to three hours before he had actually retrieved the car. Amy also told police that she had heard her mother get into a silverware drawer and get something prior to the shooting--tending to negate the inference drawn by the State that McArty had placed the knife found in decedent's hand sometime after her death. Moreoever, Amy noted that the couple argued for "3 to 4 minutes", tending to negate the State's blood spatter expert and the medical doctor who testified that Petitioner shot decedent as he came in the door. Amy did, also, state to the neighbors that her mother had been after Petitioner with a knife. On this basis, without having even attempted to interview this witness who could potentially negate several key parts of the State's case, trial counsel made a "tactical" decision not to call Amy. (Rule 37

hearing, T-80) No reviewing court has yet given a full and fair hearing to what might have been established by her testimony, but has just accepted Mathis' reasoning without question.

The touchstone is Strickland v. Washington, 466 US 668 (1984). Under any objective standard of reasonableness, failure to even attempt to interview this witness and candidly admitting on the stand that he did not know whether or not her testimony would help, takes Mathis' approach well below a standard of reasonableness. The second prong, prejudice, is clear: The witness had the potential to negate various aspects of intent and, though not an alibi witness in the classical sense, could have placed Petitioner elsewhere, or at least called into question, the credibility of Marcus Bragg as to his conversation with Petitioner and his allegedly murderous plans. Her testimony about the length of the argument potentially negates the expert's surmise of how things occurred. Second degree murder as a lesser included offense could have been a real possibility if Amy had testified to these things and to reject her without so much as talking

to her was malpractice.

2. Failure to Communicate a Plea Bargain:

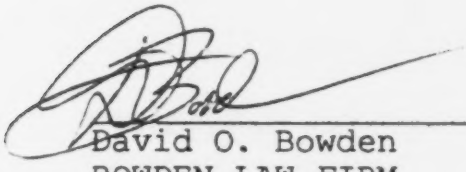
The Circuit Court judge, a former prosecutor, refused to credit B.W. Sanders testimony as to the oral plea offer and its out-of-hand rejection by Mathis. Mathis, for his part, engaged in repeated personal attacks upon Sanders and upon his former client, Petitioner, which should have rendered his testimony incredible and unworthy of belief. Sanders had absolutely no reason to bring forth such testimony if not true. Mathis, however, would be liable to the Supreme Court Professional Conduct Committee under Arkansas Model Rule of Professional Conduct, 1.2. This, again, is a violation of the tenets of Strickland v. Washington, supra. particularly in light of Petitioner's inquiries about the possibility of such a negotiated plea and his desire to take same.

CONCLUSION

Although Petitioner is unable to lay out his complete case within the confines of this format, this Court can see that there is

probable cause to consider the matter and to reverse the Magistrate, District Court and Court of Appeals at least to the extent of remanding for an evidentiary hearing on the entire record.

Respectfully submitted,



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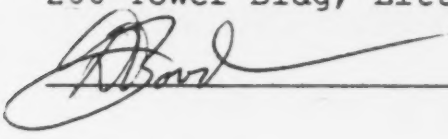
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the individual(s) listed below by placing a copy of same in the United States mail, postage prepaid, or by such other service as may be herein described.

Dated this 18th day of June, 1997

Winston Bryant, Attorney General of Arkansas,
200 Tower Bldg, Little Rock, AR. 72201



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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-3551EAPB

Randall Thomas McArty,
Appellant

Appeal from the U.S. District Court for the Eastern Dist. Of Ark.

vs.

Larry Norris, Director, Arkansas Department of Corrections,

Appellee

JUDGMENT

The court, having reviewed the record in this case, denies the certificate of appealability.

January 20, 1997

Order Entered at the Direction of the Court:
S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RANDALL THOMAS McARTY PETITIONER

V. CASE NO. PB-C-96-53

LARRY NORRIS, Director
Arkansas Department of Corrections RESPONDENT

ORDER

The Court has reviewed the proposed findings and recommended disposition received from Magistrate Judge H. David Young and objections filed in response, and has further reviewed the relevant record de novo. The Findings and Recommendations are adopted in their entirety as this Court's findings. Judgment shall be entered accordingly.

IT IS SO ORDERED this 29th day of August, 1996

S/ Susan Webber Wright
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RANDALL THOMAS McARTY PETITIONER

V. CASE NO. PB-C-96-53

LARRY NORRIS, Director
Arkansas Department of Corrections RESPONDENT

JUDGMENT

Pursuant to the Order entered in this matter on this date, it is Considered, Ordered, and Adjudged that petitioner's petition for writ of habeas corpus be and is hereby dismissed. The relief sought is denied.

IT IS SO ORDERED THIS 29TH day of August, 1996.

S/ Susan Webber Wright
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

RANDALL THOMAS McARTY PETITIONER

V. CASE NO PB-C-96-53

LARRY NORRIS, Director
Arkansas Department of Corrections RESPONDENT

FINDINGS AND RECOMMENDATIONS

Now before the Court is the application for writ of habeas corpus pursuant to 28 USC Section 2254 from Randall Thomas McArty, an inmate in the custody of the Arkansas Department of Correction (ADC) as a result of his conviction following a 1993 jury trial in Clark County Circuit Court on the charge of first-degree murder. Petitioner was sentenced to life imprisonment. A direct appeal of his conviction was unsuccessful.[1] McArty v. State, 316 Ark

[1] For reversal on direct appeal, Mr. McARty argued that the trial court erred in allowing a medical expert to testify on matters beyond his experience and that the evidence was insufficient to support the verdict.

35 (1994). Petitioner, with the assistance of retained counsel, subsequently sought postconviction relief in state court pursuant to AR Cr. P. Rule 37, alleging trial counsel was ineffective for failing to call certain witnesses and for failing to communicate a jplea offer to the petitioner. Though not alleged in his Rule 37 petition, the petitioner also put on proof in an attempt to show that he was not present at a pretrial hearing conducted in his case. After a hearing was conducted, the trial court denied Rule 37 relief, and, on appeal, the Arkansas Supreme Court affirmed the trial court's decision. McArty v. State, No. CR 94-1010 (April 10, 1995).

In the petition now before the Court, the following grounds for relief are advanced:

1. Petitioner was not present at a pretrial conference in violation of his rights;

2. His trial attorney was ineffective for failing to advise him of an alleged plea offer;

3. Hist trial attorney was ineffective for failing to call certain witnesses;

4. His trial attorney was ineffective for failing to object to a jury instruction which allegedly was consistent with an instruction for capital murder;

5. His trial attorney was ineffective for failing to remove a juror for cause;

6. His trial attorney was ineffective for failing to object during closing arguments to statements made by the prosecutor which were not supported by the evidence; and

7. His trial attorney was ineffective for failing to call an expert to rebut the state's blood spatter expert.

The respondent contends that grounds four through seven are not properly before this Court due tot he petitioner's failure to adequately raise the grounds in state court, as required by Wainwright v. Sykes, 433 US 72 (1977), and its progeny. By an

earlier Court Order, petitioner was notified that grounds four through seven might be subject to dismissal as procedurally barred. Petitioner was further notified of his opportunity to explain why these grounds should not be dismissed. Mr. McArty has submitted an explanatory pleading, and we first consider whether grounds four through seven are properly before the Court.

In Wainwright v. Sykes, *supra*, the United States Supreme Court held that a federal court should not reach the merits of a litigant's habeas corpus allegation if he has procedurally defaulted in raising that claim in state court: that is, if he was aware of the ground, but failed to pursue it to a final determination. The exception created by the Supreme Court permits such an allegation to be addressed if the litigant can establish "cause" for his failure to assert the known ground and "prejudice" resulting from that failure.

See also Clark v. Wood, 823 F2d 1241, 1250-51 (8th Cir. 1987); Messimer v. Lockhart, 822 F2d 43, 45 (8th Cir. 1987). The

Wainwright v. Sykes cause and prejudice test was clarified by two subsequent Supreme Court decisions, Smith v. Murray, 477 US 527 (1986), and Murray v. Carrier, 477 U.S. 478 (1986).

With respect to cause, these cases explain that the Court has "declined in the past to essay a comprehensive catalog of the circumstances that [will] justify a finding of cause." Smith v. Murray, 477 U.S. 533-34. However, one can discern from these cases several circumstances in which cause might be found: first, where some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules, see, Murray v. Carrier, 477 US at 488; second, where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, see Reed v. Ross, 468 US 1 (1984); or third, if the litigant failed to receive the effective assistance of counsel. See Murray v. Carrier, 477 US at 488. In addition, there is one extraordinary circumstance where a federal habeas court may grant relief without a showing of cause: where a

constitutional violation has probably resulted in the conviction of one who is actually innocent. Id at 496.

In his explanatory pleading, Mr. McArty first argues that he attempted to raise the jury instruction issue (ground four), and he offers as evidence a copy of a certified letter to his attorney. This attorney, William McArthur, represented petitioner on direct appeal and on the Rule 37 proceeding. The certified letter is dated August 23, 1994, about seven months after the Arkansas Supreme Court had denied petitioner's request for reversal. Thus, the opportunity to challenge the trial court's use of the instruction on direct appeal had passed. The petitioner, however, contends that the claim should have been advanced as an instance of ineffective assistance of counsel in the Rule 37 proceeding. Specifically, he claims that his Rule 37 attorney erred by failing to argue that his trial ocunsel erred by not objecting to the allegedly incorrect jury instruction. This argument, however, is without merit. First, we note that Rule 37 proceedings

are postconviction in nature, and a petitioner is not constitutionally guaranteed effective counsel in such proceedings. Coleman v. Thompson, 501 US 722 (1991). As a result, the burden falls upon the petitioner himself to advance all of his grounds in such proceedings. Thsi simply means that, in a typical Rule 37 jproceeding in Arkansas, the *pro se* petition should be comprehensively prepared by the petitioner. Petitioner's retention of counsel for his Rule 37 action places him in a different setting. It does not, howver, relieve him of the responsibility of advancing all of his grounds. If an attorney fails to include certain desired claims in a Rule 37 action, the petitioner who chooses not to replace that attorney with another or to proceed *pro se* does so at his own risk. While this conclusion may seem harsh, it is consistent with the constitutional framework which ensures the assistance of counsel at trial and on direct appeal but not thereafter in collateral proceedings. Hence, the allegations that the attorney prosecuting the Rule 37 petition failed to include ground

four is an insufficient explanation for the failure to pursue the claim in state court.

Next, Mr. McArty claims that ground five was not raised despite trial counsel's being apprised that juror Jeri Carter was related to the petitioner and was possibly hostile. Petitioner's mother indicates in an affidavit that she told Travis Mathis, the trial attorney, that Carter was Sorrells' cousin and that carter should be stricken.[2] The affidavit does not indicate that the Rule 37 attorney was informed of this allegation. The problem with this argument is, however, the same flaw with the first contention Mr. McArty raised to explain the apparent procedural default--the petitioner failed to advance it in his Rule 37 proceeding. "A claim of ineffective assistance of counsel must be presented to the state court as an

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[2]In petitioner's reply (Docket Entry #7), he indicates that his mother informed the Rule 37 attorney of the presence of her cousin on the jury. The affidavit of Mr. McArty's mother does not state that she informed Mr. McArthur about Ms. Carter.

independent claim before it may be used to establish cause for procedural default or denominated as ground for habeas relief." Leggins v. Lockhart, 822 F2d 764, 768 n.5 (8th Cir 1987). In this instance, the Rule 37 petition focuses on two allegations of ineffective assistance of counsel but includes no reference to the jury selection. Further, petitioner's mother testified at the Rule 37 hearing without mention of the alleged error in selecting the jury. Again, the petitioner must advance his claims in state court, and the petitioner bears the responsibility for advancing claims of ineffective assistance of counsel in the Rule 37 proceedings. The alleged notice given by petitioner's mother to the trial attorney does not cure the petitioner's failure to pursue the claim in state court.

For his third explanation to remedy the apparent procedural default, petitioner claims that trial counsel failed to object during closing argument. This argument fails because it does not demonstrate why petitioner failed to advance his grounds in state

court. Assuming trial counsel failed to object during closing argument, it does not follow that such an error prevented Mr. McArty from raising his claims in state court.

The final argument of Mr. McArty in opposing the respondent's claim of procedural default is that his attorney erred by not locating and reatinaing an expert on blood spattering. The petitioner claims that he did not know that the trial attorney considered calling such a witness until reviewing the trial attorney's file in preparation to file this federal habeas corpus action. Even so, there is no causal connection between the trial attorney's failure to call a blood-spatter expert and the petitioner's failure to advance grounds four, five and six in state court. The seventh ground, which is itself the claim of failure to call the blood-spatter expert, could have been raised in the Rule 37 proceedings, but was not. There is no apparent reason why the petitioner could not have raised this claim in his Rule 37 petition, and the discovery that the trial attorney

contemplated retaining such an expert to rebut the testimony offered by the prosecution, but did not, is not an adequate excuse for failing to advance the claim in state court.

In summary, the petitioner shows no adequate excuse for not raising and litigating grounds four through seven in state court. Petitioner, through ocunsel, pursued several claims for relief both on direct appeal and in a Rule 37 proceeding. He has not established "cause" for failing to submit grounds four through seven in state court. Therefore, these claims are not considered by this Court.

We now consider grounds one, two and three. These claims were all raised in the Rule 37 petition. As a result, the respondent claims that the factual findings of the state court trial judge, as affirmed by the Arkansas supreme Court on appeal, are entitled to a presumption of correctness pursuant to 28 USC 2254(d). The petitioner counters that the presumption of correctness should not apply because the Rule 37 hearing was not a "full and fair hearing"

and the facts were not adequately developed. (Petition, p.2) . The Court has reviewed the transcript of the Rule 37 hearing, as well as the findings of the trial judge and the opinion of the Arkansas Supreme Court. We cannot agree that the petitioner was denied a full and fair opportunity to litigate his grounds in state court. It is true that the trial judge was faced with many credibility determinations and that the trial judge found against the petitioner in this regard. The key factual findings of the trial judge include his finding that the trial attorney explained why he chose not to call certain witnesses, that there was no credible evidence that a plea bargain was offered to the petitioner, and that petitioner was present in the courtroom on June 4, 1993, pretrial conference. (Respondent's Exhibit D).

Petitioner contends that the Rule 37 hearing was not a full and fair opportunity to present his claims because the trial judge conducting the hearing was "apparently the law partner of Travis

Mathis" at some point in time and this apparent relationship may have affected the judge's decision. In addition, Mr. McArty states that the trial judge was a former prosecutor, who, during his prosecutorial tenure, required that plea bargains be reduced to writing. This former policy may have tainted the judge's view of the proceedings, according to the petitioner. Finally, Mr. McArty argues that the trial judge failed to address, except in summary fashion, the reason why the trial attorney failed to explore calling the victim's ten-year-old daughter as a witness. These allegations fail to show that the hearing was less than a full and fair opportunity to consider the petitioner's claims. In part, the petitioner's allegations are speculative. The mere possibility that the trial judge practiced law with Travis Mathis at some point does not prove the petitioner's point. In addition, the trial judge's status as a former prosecutor does not necessarily establish that the hearing was tainted or that the trial judge ruled against the petitioner due to his former employment. A close review

of the transcript of the Rule 37 hearing shows that Mr. McArty was represented by retained counsel who vigorously litigated the case. There is no evidence that the trial judge precluded the petitioner from developing his case. To the contrary, the petitioner's Rule 37 petition contained only two claims of ineffective assistance of counsel (failure to call witnesses and failure to communicate a plea offer), yet petitioner was permitted to offer evidence of a third claim for relief for failure to be present at a pretrial hearing. Simply put, the petitioner was afforded a full and fair opportunity to advance his claims in state court. As a result the factual findings rendered in the state court are presumed correct.

The first claim for relief is that Mr. McARty was not present at a pretrial hearing. The factual finding of the state court is that he was present at the June 4, 1993 hearing. The trial ocurt noted the following in support of its finding:

"As to the allegation that Defendant was not present at

the June 4th, 1993 pre-trial conference, the Court finds:

(A) Randall McArty testified he was not present at the June 4th pre-trial conference and this deprived him of a fair trail (sic)

(B) Teresa Powell testified that Randall McArty hauled four loads for her company on June 4th to the city of Lewisville. Her testimony is contradicted by Petitioner's Exhibit #1 in that the four tickets indicates (sic) that the loads were hauled by Elmer McArty. The Truck No. Has been altered on ticket No. 25928.

(C) Travis Mathis, Sr. testified that he was sure that he was present on that date; however, his practice has always been that the Defendant be present at all stages of the trial.

(D) Henry Morgan could not be positive that he was there but he thought that he was present.

(E) Transcript of the pre-trial conference on June 4, 1993, Petitioner's Exhibit 2,. states as follows:

'The State is represented by Mr. Henry Morgan, Prosecuting Attorney and Mr. Taylor King, Deputy Prosecuting Attorney 9-E. The Defendant is presentwith his attorney, Mr. Travis Mathis, Sr.'

Court considering all of the evidence finds that the Defendant, Randall McArty, was present at the June 4, 1993, Pre-trial conference."

No relief is available, as we presume that Mr. McArty was present at the hearing.

The petitioner's second ground is that his attorney failed to apprise him of a plea offer from the prosecutor. The trial court found as follows:

> As to the allegation that Defendant's trial attorney rendered ineffective assistance as he did not communicate a plea bargain to him that was offered by the Prosecuting Attorney wherein the charge would be reduced to Second Degree Murder and a recommendation of twenty years in the Department of Corrections, the Court finds: Prosecuting Attorney Henry Morgan states that there was never a plea bargain offered by him. Former Prosecuting Attorney B.W. Sanders states that he offered to reduce the charge to Second Degree Murder and that he offered twenty years upon a plea of guilty. Trial Attorney, Travis Mathis, Sr. states there was never a plea bargain offered by either Prosecuting Attorney Morgan or B.W. Sanders.
>
> Credibility of Mr. Sanders statment was questioned as follows:
>
> Mr. Morgan states that Mr. Sanders called his office a few weeks prior to this hearing and wanted to see the McArty file. That after Mr. Sanders reviewed the file he stated: "I guiess I was mistaken, I thought I offered a plea bargain." This was after he reviewed the file and could not find a written plea bargain.

> Becky Ursery, an employee of Mr. Morgan, stated that she heard Mr. Sanders make the statement: "I didn't think that I did, but I wanted to make sure."
>
> Mr. Sander's credibility if further attacked when he stated that he made no charge to Patsy Sorrells, Defendant's mother, for reviewing the Prosecutors file and Mrs. Sorrells stated on cross-examination that he charged her fifteen dollars and she wrote him a check.
>
> Based upon all of the evidence presented, the Court finds that there is no creditable evidence that there was ever a plea bargain offered in this case and therefore Defendant's allegation is not sufficient to warrant relief under Rule 37.

We presume correct the finding that no plea bargain was extended to petitioner's trial attorney. Hence, no relief is warrented for the second claim of Mr. McArty.

The third and final ground advanced by the petitioner is that his attorney erred by failing to call certain witnesses at the trial. These witnesses were not alibi witnesses in the purest sense, as there was no debate that petitioner shot the victim. The witnesses may have assisted petitioner in lessening the offense with which he as convicted

from first-degree murder to a lesser crime or in obtaining an acquittal based uon his trial strategy of showing the killing occurred in self-defense. The Arkansas supreme Court summarized the evidence as follows:

> Appellant Randall Thomas McArty was charged with the first degree murder of Teresa Chamberlain. McArty was tried, convicted and sentenced to life imprisonment in the Arkansas Department of Correction. Two points for reversal are argued: it was error to allow the state to question a medical expert on matters beyond his experience and the evidence of guilt was not sufficient to support the verdict. As we cannot sustain the arguments, we affirm the judgment entered pursuant to the verdict.
>
> The facts, related from the state's position, are these: At about 10:30 p.m., July 31, 1992, officers of the Clark County Sheriff's Department responded to an emergency at the Gurdon home which Randy McArty shared with Teresa Chamberlain. McArty had gone to a neighbor and the sheriff was called. When an officer asked McArty what the problem was, he answered, "I shot her. I shot her."
>
> Inside they found the body of Teresa

Chamberlain on the kitchen floor with a gaping wound in the left chest. She was lying just insdie a door leading to the carport. A butcher knife was in her right hand. Buckshot pellets were embedded in the wall opposite the door. In the carport was a vehicle with the lights on. A .12 guage shotgun and a box containing on shell were in the car. One expended shell was in the gun and one was in McArty's pocket.

Daniel Blasingame testified that he had been staying at the McArty residence for several days working on Teresa Chamberlain's car. On the afternoon of July 31 he and Teresa had gotten beer and tequila and had been driving around, using Randy's car. They had stopped at Lennie Richard's house when Randy arrived. There was an argument and Randy left. Blasingame and Mrs. Chamberlain came home later and Blasingame went to bed in a back room. Teresa went to bed in the bedroom and her ten-year-old daughter Amy, slept on a couch. Blasingame awoke to hear Teresa call for help. He heard a shot. When he came into the kitchen Teresa was lying on the floor and Randy was in the doorway holding the shotgun. Randy said, "I'm going to call an ambulance" and went next door.

The state's witnesses included Marcus Bragg, an acquaintance of Randy McArty from school days, who testified that he met McArty by chance on July 31, 1992. In their conversation

McArty told him he wanted to kill this woman, but later said he wouldn't bother her. The next day Bragg heard she had been killed.

James Dillard testified that on the late afternoon of July 31, 1992, Randy McArty came into his store and bought five shotgun shells, No. 1 buckshot.

Tommy McMillan, a neighbor, testified that Randy came to his house that night, hollering that he had shot his girlefriend, that she had a big knife and was going to stab him. He heard Amy say her mother was after Randy with a knife and Randy shot her.

Randy McArty testified that he met Teresa in January of that year and she moved in with him four or five weeks later. He described episodes of physical violence between them including a time when Teresa had scalded him with the contents of a crock-pot.

When he found Teresa and Dan at Linnie Richard's house he asked Teresa for the keys to his car and had to take them from her. As he was preparing to leave, Teresa cursed him and tried to strike him through the window. When he got home about 10:00 p.m. the house was dark. He switched on the light in the kitchen and Teresa was standing there. The argument resumed and Teresa tried to

> get at him with the knife. He raised the gun as she turned and it went off. She called to Dan to help her and Randy left to call an ambulance.
>
> There was other proof from which varying inferences could be drawn. The state offered evidence suggesting that the knife was placed in Teresa's hand afterwards and that the shot was fired as Teresa was opening the kitchen door. Blasingame testified he saw no knife. These were issues for the jury.

316 Ark at 36-7

In his order following the Rule 37 hearing, the trial judge found that trial strategy and tactics were the reason that the trial attorney did not call Amy Chamberlain, Mike Olson, Patsy Sorrells, Beth Draper as witnesses. Again, such a finding is entitled to a presumption of correctness. Blair v. Armontrout, 976 F2d 1130, 1136-7 (8th Cir. 1992). Even if such a finding were not presumed correct, we find that petitioner has not shown that he was prejudiced by counsel's decision not to call these witnesses. See Strickland v. Washington, 466 US 668 (1984). Indeed, the key witness among

those listed by petitioner was Amy Chamberlain, and a neighbor was permitted to testify to the pivotal statment she could have offered at trial. Hence, no prejudice was shown by Mr. McArty.

In summary, we find that grounds four through seven are not properly before this Court due to the petitioner's unexcused failure to present these grounds in the appropriate state court forum. Grounds one, two and three are without merit, for the reasons stated herein. Accordingly, we recommend that the petition for writ of habeas corpus be dismissed and the relief requested denied.

DATED this 28 day of June, 1996.

S/ H. David Young, Jr.
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-3551EAPB
Randall Thomas McArty,
Appellant

Appeal from the U.S. District Court for the Eastern Dist. Of Ark.

vs.

Larry Norris, Director, Arkansas Department of Corrections,

Appellee

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 20, 1997

Order Entered at the Direction of the Court:

S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

CONSTITUTIONAL PROVISIONS, STATUTORY AND COURT RULES PROVISIONS

AMENDMENT V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV, SECTION 1:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

B. 28 USC SECTIONS (d)-(e):

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,

unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant

to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and

circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

C. ARKANSAS RULES OF CRIMINAL PROCEDURE, RULE 37

RULE 37.1. Scope of Remedy

A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

(b) that the court imposing the sentence was without jurisdiction to do so; or

(c) that the sentence was in excess of the maximum sentence authorized by law; or

(d) that the sentence is otherwise subject to collateral attack; may file a verified petition in the court which imposed the sentence, praying that the sentence be vacated or corrected.

(e) The petition will state in concise, nonrepetitive, factually specific language, the grounds upon which it is based and shall not exceed ten pages in length. . . .

D. ARKANSAS CODE ANNOTATED 16-91-113. Matters to be considered - Preserving error Action to be taken.

(a) The Supreme Court need only review those matters briefed and argued by the appellant, except that, where either a sentence for life imprisonment or death has been imposed, the Supreme Court shall review all errors prejudicial to the rights of the appellant.

ARKANSAS SUPREME COURT RULE 4-3. BRIEFS IN CRIMINAL CASES
(h) COURT'S REVIEW OF ERRORS IN DEATH OR LIFE

IMPRISONMENT CASES.

When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. Sec. 16-91-113 (a). To make that review possible, the appellant must abstract all rulings adverse to him or her made by the trial court on all objections, motions and requests made by either party, together with such parts of the record as are needed for an understanding of each adverse ruling. The Attorney General will make certain and certify that all of those objections have been abstracted and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

McARTY V. STATE, 316 Ark 35 (1994)
Randall Thomas McARTY v. STATE of Arkansas
CR 93-1071
871 SW2d 346
Supreme Court of Arkansas
Opinion delivered February 21, 1994

Appeal from Clark Circuit Court; W.H. "Dub" Arnold, Judge;
(Page 36)
affirmed.

McArthur and Finkelstein, by William C. McArthur, for appellant.

Winston Bryant, Att'y Gen., by: Kent G. Holt, Asst. Att'y Gen. for appellee.

STEELE HAYS, Justice.

Appellant Randall Thomas mcArty was charged with the first degree murder of Teresa Chamberlain. McArty was tried, convicted and sentenced to life imprisonment in the Arkansas Department of Correction. Two points for reversal are argued: it was error to allow the state to question a medical expert on matters beyond his experience and the evidence of guilt was not sufficient to support the

verdict. As we cannot sustain the arguments, we affirm the judgment entered pursuant to the verdict.

The facts, related from the state's position, are these: At about 10:30 P.M., July 31, 1992, officers of the Clark County Sheriff's Department responded to an emergency at the Gurdon home which Randy McArty shared with Teresa Chamberlain. McArty had gone to a neighbor and the sheriff was called. When an officer asked McArty what the problem was, he answered, "I shot her. I shot her."

Inside they found the body of Teresa Chamberlain on the kitchen floor with a gaping wound in the left chest. She was lying just inside a door leading to the carport. A butcher knife was in her right hand. Buckshot pellets were embedded in the wall opposite the door. In the carport was a vehicle with the lights on. A .12 gauge shotgun and a box containing one shell were in the car. One expended shell was in the gun and one was in McArty's pocket.

Daniel Blasingame testified that he had been staying at the McArty residence for several days working on Teresa Chamberlain's car. On the afternoon of July 31 he and Teresa had gotten beer and had stopped at Lennie Richard's house when Randy arrived. There was and argumemnt and Randy left. Blasingame and Mrs. Chamberlain came home later and Blasingame went to bed in a back room. Teresa went to bed in the bedroom and her ten-year-old daughter, Amy, slept on [Page 37] a couch. Blasingame awoke to hear Teresa call for help. He heard a shot. When he came into the kitchen Teresa was lying on the floor and Randy was in the doorway holding the shotgun. Randy said, "I'm going to call an ambulance" and went next door.

The state's witnesses included Marcus Bragg, an acquaintance of Randy McARty from school days, who testified that he met McArty by chance on July 31, 1992. In their conversation McArty told him he wanted to kill this woman, but later said he

wouldn't bother her. The next day Bragg heard she had been killed.

James Dillard testified that on the late afternoon of July 31, 1992, Randy McARty came into his store and bought five shotgun shells, No. 1 buckshot.

Tommy McMillan, a neighbor, testified that Randy came to his house that night, hollering that he had shot his girlfriend, that she had a big knife and was going to stab him. He heard Amy say her mother was after Randy with a knife and Randy shot her.

Randy McArty testified that he met Teresa in January of that year and she moved in with him four or five weeks later. He described episodes of physical violence between them including a time when Teresa had scalded him with the contents of a crockpot.

When he found Teresa and Dan at Lennie Richard's house he asked teresa for the keys to his car and had to take them from her. As he was preparing to leave, Teresa cursed him and tried to strike him through the window. When he got home about 10:00 P.M. the

house was dark. He switched on the light in the kitchen and Teresa was standing there. The argument resumed and Teresa tried to get at him with the knife. He raised the gun as she turned and it went off. She called to Dan to help her and Randy left to call an ambulance.

There was other proof from which varying inferences could be drawn. The state offered evidence suggesting that the knife was placed in Teresa's hand afterwards and that the shot was fired as Teresa was opening the kitchen door. Blasingame testified he saw no knife. These were issues for the jury. [Page 38]

The state called physician William Quinton Sturner, chief medical examiner of Arkansas, who performed the autopsy. The pellets entered her upper left chest at an angle, penetrated the aorta, and emerged behind the upper right arm and back. Dr. Sturner was asked about the trajectory of the pellets after leaving the body. Defense counsel objected on the grounds that Dr. Sturner was not an arms expert and was not qualified to say what would happen to the

pellets after leaving the body. The objection was overruled and Dr. Sturner stated that the pellets "went out separated."

Citing Wilburn v. State, 289 Ark 224, 711 SW2d 760 (1986), McArty argues on appeal that the test for expert testimony wis whether the witness has knowledge of the subject at hand which is beyond that of ordinary people. Appellant concedes that in Ferrell v. State, 305 Ark 511, 810 SW2d 29 (1991), we found no abuse of discretion by the trial court in allowing a nonexpert to testify concerning a firearm, but, he argues, in contrast to this case, the witness in Ferrell had extensive experience with firearms.

[1] First, we regard the issue as largely abstract, as appellant has not shown us how the pattern of the emerging pellets had any substantial impact on the trial. ARE 103(d). Second, we think common experience would suggest the likelihood of some dispersion of shotgun pellets, even buckshot, entering the body at a slight angle near the upper chest and emerging behind the upper arm. The

sternum and shoulder blade, even the soft tissues and cartilage, could hardly be expected to have no effect on the trajectory of shotgun pellets. Third, issues of this kind fall clearly within the discretion of the trial court and no abuse of that discretion is evident here. White v. State, 303 Ark 30, 792 SW2d 867 (1990).

[2] Turning to the sufficiency of the evidence, we need refer to only three segments of the proof: The testimony of Marcus Bragg that McArty spoke of killing the woman he was living with; the testimony of James Dillard that McArty purchased five shotgun shells around five o'clock that afternoon; and the fact that McArty had the loaded shotgun at his side when he entered the house. Obviously it cannot be said that evidence of intent was so lacking that a directed verdict was called for. Taylor v. State, 303 Ark 586, 799 Sw2d 519 (1990). [Page 39].

The record has been examined in accordance with Ark. Sup. Ct. R. 4-3(h), and the objections have all been abstracted and

certified by the state. There are no other rulings adverse to the appellant which constituted prejudicial error.

For the reasons stated, the arguments presented on appeal are denied and the judgment of conviction is affirmed.

HOLT, C.J. , not participating.

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

V. CR 92-111

RANDALL McARTY DEFENDANT

ORDER

Comes before the Court on this 3d day of June, 1994, the above-styled case. The State of Arkansas represented by Deputy Prosecuting Attorney, Todd Turner and the Defendant, Randall McArty, appearing in person and by his Attorney, William mcArthur. The case having been set for a hearing on the Defendant's petition pursuant to Rule 37 of the Rules of Criminal Procedure, wherein the Defendant alleges that his Trial Attorney, Travis Mathis, Sr., was ineffective because he failed to call certain witnesses, failed to communicate a plea bargain from the Prosecuting Attorney and that the Defendant was not present at a pre-trial conference. Both

Plaintiff and Defendant reporting ready for the hearing.

The Defendant called the following witnesses: Patsy Sorrells, Randall McArty, B.W. Sanders, and Teresa Powell. The State called: Travis Mathis, Sr., Henry Morgan, Mitch Pierce, Josie Little and Becky Ursery.

The Court considering all of the evidence presented, including a portion of the trial transcript, marked Petitioner's Exhibit No. 2 and makes the following finding:

(1) As to the allegation that Defendant's trial attorney failed to call certain witnesses, the Court finds: That the trial attorney has offered an explanation as to why he did not call Amy Chamberlain, Mike Olson, Patsy Sorrells, and Beth Draper. His explanation is one of trial strategy and tactics. This judge having served as a trial judge in this case cannot find fault in his decision based upon all of the evidence presented in the trial. The Arkansas Supreme Court in the cases of HILL VS. STATE 292 Ark. 144 (1988) and MISSILDINE

VS STATE, 314 Ark 500 (1993) states: "Matters of trial strategy and tactics, even if arguably improvident, are not grounds for a finding of ineffective assistance of counsel."

(2) As to the allegation that Defendant's trial attorney rendered ineffective assistance as he did not communicate a plea bargain to him that was offered by the Prosecuting Attorney wherein the charge would be reduced to Second Degree Murder and a recommendation of twenty years in the Department of Corrections, the Court finds: Prosecuting Attorney Henry Morgan states that there was never a plea bargain offered by him. Former Prosecuting Attorney B. W. Sanders states that he offered to reduce the charge to Second Degree Murder and that he offered twenty years upon a plea of guilty. Trial Attorney, Travis Mathis, Sr,. states that there was never a plea bargain offered by either Prosecuting Attorney Morgan or B.W. Sanders.

Credibility of Mr. Sanders statement was questioned as

follows:

Mr. Morgan states that Mr. Sanders called his office a few weeks prior to this hearing and wanted see the McArty file. That after Mr. Sanders reviewed the file he stated: "I guess I was mistaken, I thought I offered a plea bargain." This was after he had reviewed the file and could not find a written plea bargain.

Becky Ursery, an employee of Mr. Morgan, stated that she heard Mr. Sanders make the statement: "I didn't think that I did, but I wanted to make sure."

Mr. Sander's credibility is further attacked when he stated that he made no charge Patsy Sorrells, Defendant's mother, for reviewing the Prosecutors file and Mrs. Sorrells stated on cross-examination that he charged her fifteen dollars and she wrote him a check.

Based upon all of the evidence presented, the Court finds that there is no creditable evidence that there was ever a plea bargain

offered in this case and therefore Defendant's allegation is not sufficient to warrant relief under Rule 37.

(3) As to the allegation that Defendant was not present at the June 4th, 1993 pre-trial conference, the Court finds:

A) Randall McArty testified he was not present at the June 4th pre-trial conference and this deprived him of a fair trial.

(B) Teresa Powell testified that Randall McArty hauled four loads for her company on June 4th to the city of Lewisville. Her testimony is contradicted by Petitioner's Exhibit #1 in that the four tickets indicates that the loads were hauled by Elmer McArty. The Truck No. Has been altered on ticket No. 26928.

(C) Travis Mathis, SR. Testified that he was sure that he was present on that date; however, his practice has always been that the Defendant be present at all stages of the trial.

(D) Henry Morgan could not be positive that he was there but he thought that he was present;

(E) Transcript of the Pre-trial conference on June 4, 1993, Petitioner's Exhibit 2, states as follows:

"The State is represented by Mr. Henry Morgan, Proscuting attorney and Mr. Taylor King, Deputy Prosecuting Attorney 9-E. The Defendant is present with his attorney Mr. Travis Mathis, Sr."

Court considering all of the evidence finds that the Defendant, Randall McArty, was present at the June 4, 1993, Pre-trial conference. The Court further finds: That the Pre-trial conference on June 4th was to discuss the numbering of the exhibits before trial, any objections to exhibits to be offered and submission of jury instructions with objections. Exhibits objected to would be heard and were heard on the morning of the trial, June 21, 1993, this conference was to avoid any unnecessary delay on the morning of the trial. Even if the defendant had not been present, there was no action taken by the Court that was so serious as to deprive the Defendant of a fair trial and there is no showing of actual prejudice to the defense to

warrant relief, MALONE VS STATE, 294 Ark 127 (1987).

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Rule 37 petition of the Defendant is denied for the reasons stated above as the Defendant has failed to prove that he had ineffective assistance of counsel or that he was denied a fair trial.

S/ W.H. "Dub" Arnold
Circuit Judge 9-E
June 14, 1994

NOT DESIGNATED FOR PUBLICATION

SUPREME COURT OF ARKANSAS
No. CR 94-1010

RANDALL THOMAS McARTY
Appellant

V.

STATE OF ARKANSAS
Appellee

Opinion Del. 4/10/95
Appeal from the Circuit Ct. Of Clark County, AR. (No. CR 92-111) Hon. W.H. "Dub" Arnold, Judge

AFFIRMED

PER CURIAM

The appellant Randall Thomas McArty was convicted of first degree murder and sentenced to life imprisonment. His case was affirmed on appeal. McArty v. State, 316 Ark 35, 871 SW2d 346 (1994). The appellant filed a petition for post-conviction relief which was denied by the trial court and the appellant brings this appeal.

To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient.

This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the sixth amendment. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. In making a determination on a claim of ineffectiveness, the totality of evidence before the judge or jury must be considered. Strickland v.

Washington, 466 US 668 (1984). On appeal, this court affirms the trial court's denial of post-conviction relief unless it is clearly against the preponderance of the evidence. Atchison v. State, 298 Ark 344, 767 SW2d 312 (1989). Where the evidence is sufficeint to support a ruling either way, it cannot be said that the trial court's ruling is clearly against the preponderance of the evidence. Atchinson v. State, 298 Ark 344, 767 SW2d 312 (1989).

The appellant claims that the prosecutor at the time the charges were filed, Bob Sanders, made a plea offer to his attorney and his attorney never conveyed the offer to the appellant. Apparently, at some point after the trial, Bobby Sanders asked the appellant's mother why the appellant had not taken the plea bargain offer. She said she had not known about an offer. Sanders testified at the post-conviction relief hearing that he looked throught the case file but had not found written evidence of the offer. Sanders testified that he made an oral offer to the appellant's attorney, but that the

attorney responded that he did not think his client would be interested. The appellant's attorney denied that any such discussion ever took place. Another witnesses testified that Sanders said, when looking through the appellant's case file, that he did not think that he had made an offer. Sanders, who was defeated by Henry Morgan in an election for the position of prosecutor, testified that he did not discuss the plea offer with Morgan. Morgan testified that he did not know whether a plea offer had been made. Where there is a conflict of testimony, it is the trial judge's job to resolve the conflict. Huff v. State, 289 Ark 404, 711 SW2d 801 (1986). When the evidence presented supports a ruling either way, it cannot be said the trial court's ruling is clearly against the preponderance of the evidence. Ackers v. State, 294 Ark 47, 740 SW2d 620 (1987).

The appellant claims that he was not present at his preliminary hearing. Teresa Powell, who works where the appellant was employed, testified that on June 4, 1993, the date of the preliminary

hearing, the appellant was at work the entire day. The transcript for the pretrial hearing states that the defendant was present. During cross-examination, Powell stated that on the ticket showing which truck picked up gravel on the day of the hearing, she altered the number from the appellant's father's truck number to the appellant's truck number. She said she had mistakenly put the elder McArty's number and then corrected it.

The appellant's trial attorney testified at the hearing that he was sure the appellant was present at all pretrial hearings. Again, this was a conflict of testimony for the trial judge to resolve. Huff v. State, 289 Ark 404 (1986).

The appellant claims that a number of witnesses were brought to court to testify but were many not called. The trial judge held that the calling of witnesses is a matter of trial strategy and tactics and is not a ground for finding ineffective assistance of counsel. Hill v. State. 292 Ark 144, ____ SW2d___ (1988). The appellant has not

demonstrated that this ruling is clearly against the preponderance of the evidence. The appellant particularly claims that the victim;'s child was in the house at the time of the killing and would have testified that her mother had been chasing the appellant with a knife. The appellant claims that this was crucial to him since his defense was one of justification. There was testimony that this evidence came in at appellant's trial through other witnesses as excited utterances; therefore, there was no prejudice to the appellant.

Affirmed.

Dudley, J., not participating.

. . . . TRIAL TESTIMONY OF MARCUS BRAGG

MARCUS BRAGG, having been called as a witness on behalf of the State and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MORGAN:

(T-333)

Q. Would you get up close to that microphone and introduce yourself to the jury, please?

A. I'm Marcus Bragg.

(T-334)

Q. Where do you live, Mr. Bragg?

A. Gum Springs, Arkansas.

Q. How long have you lived in Clark County?

A. I guess about 10 years.

Q. Do you know Randy McArty?

A. Yes.

Q. How do you know Randy?

A. Lived at Delark. He went to school at Sparkman, and I went to school at Sparkman down there.

Q. So you've known him from school days?

A. Yeah.

Q. Last summer, did you have an occasion to meet Mr. McArty on the Interstate?

A. Yes, I did.

Q. Can you tell a little bit about what happened to the jury?

A. Well, I was going east and he was going east. He stopped me. He stopped me and he got to telling me about him and this woman he was into, and he wanted to kill her, and says she had scalded him once with the left foot with a crockpot, and I told him it ought not to do that. So we kept on talking and he told me he wasn't gonna bother her, so he said somebody had run over this woman. I don't know who that was. So he was driving some little blue car there. He

said he had her car at home overhauling it, but they had runn of in his car. So me and him got through talking and I went on about my business and he went on about his. (T-335) So the next day or two, I heared he had killed the girl.

Q. Where did this occur? How did you get on the Interstate? Where did you get on and where were you headed?

A. I was headed to Hot Springs.

Q. You got on the Interstate where though?

A. Gum Springs Exit.

Q. And where did Mr. McArty flag you down?

A. Just before I got to the overpass, the last overpass before you get to Arkadelphia.

Q. Who passed who first?

A. I passed him.

Q. And that's when he flagged you down?

A. Yeah.

Q. And you stopped?

A. Yes.

Q. And how did the conversation begin?

A. Well, he just out and started talking. He got to telling me about his woman. He and this woman was having problems.

Q. Did he appear to be angry?

A. Well, I don't know. No, not really, you know, but he got to talking about what he was gonna do to her. I don't know whether he was angry or not.

Q. What did he say he was going to do to her?

A. Told me he was gonna kill her, and I told him he ought not do that.

(T-336)

BY MR. MORGAN: Pass the witness.

BY THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. MATHIS:

Q. Mr. Bragg, did he say he ought to kill her, or was he gonna kill her or ought to kill her?

A. He said he ought to kill her.

Q. Said he ought to kill her, didn't he? Now have you ever heard anybody else say, "I ought to kill that fellow." In your whole life you never heard that expression?

A. Yeah, I heard that expression and I hear some of them didn't kill and I heard some of them did kill.

Q. Yeah, and you didn't see him on July the 31st, did you?

A. I didn't see him no more after that evening.

Q. Huh?

A. I didn't see him no more after that evening.

Q. What evening was that?

A. On a Friday evening.

Q. What Friday evening?

A. I don't know what date it was. I wasn't keeping up with no date cause I was going on about my business.

Q. All you know is it was sometime after the crockpot scalded his foot?

A. Well, it happened Friday evening. He stopped me and me and him had this conversation.

(T-337)

Q. Well, I thought you said something about a crockpot a while ago?

A. It did--scalded part of the left foot.

Q. Oh, his left foot. Didn't have a shoe on it, did he?

A. He had house shoes on.

Q. Right, and he was in a blue car?

A. That's right.

Q. And it was about what time of the day?

A. About 5 or 6 o'clock, something like that, I guess. You know, I--

Q. P.M.?

A. I guess what time--I'm guessing at the time cause I--

Q. Where had you been?

A. Work.

Q. Work where?

A. Bunn's Construction Company.

Q. Where was they working?

A. I don't know where we was working back then.

Q. Do you know where you'd come from?

A. I come from home. That's where I come from.

[Remaining portion of testimony on cross from 336 to 340 omitted.]

(T-340)

Q. Okay, and that was before a week past--that was the next few days?

A. I told you that Friday when he talked to me and I didn't find out

(T-340)

till about Wednesday or Tuesday, something like that. I wasn't keeping no date cause I didn't think nothing about it.

Q. But you know it was the next Tuesday or Wednesday, right?

A. Yeah, something like that.

Q. Now you were going down the highway on your motorcycle, and he's going down the highway in his blue car, wasn't he?

A. With a blue car.

Q. And he flagged you down?

A. That's right.

Q. And he comes up to your motorcycle?

A. That's right.

Q. And he said, "Marcus, look where this woman burned my foot"?

A. Naw, we started talking. The he got to telling me about his problems.

Q. About his crockpot?

A. Well, he started telling about his problems, see, about somebody

run over his woman over at Okolona or something or the other.

Q. Did he say he'd run over there then?

A. With his car. He was overhauling her car in the yard.

Q. And she'd run off in his car?

A. That's right.

Q. And the car he was in was blue?

A. Blue, but how do I know the car did it?

Q. That was between 5 and 6?

(T-342)

A. I don't know what time it was. I don't--

Q. That was in the morning or evening?

A. In the evening.

Q. Was it during night fall or was it during the middle of the afternoon?

A. Well, man, let me tell you, in summertime, daylight stays so long, I don't know. It was that evening.

Q. Well, a while ago you told this jury. You're under oath.

A. I said about 5 or 6 o'clock. I' don't know what time it was. I didn't have no watch on.

JAMES DILLARD

having been called as a witness on behalf of the State and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

(T-346)

BY MR. MORGAN:

Q. Would you please introduce yourself to the jury?

A. I'm James Dillard; run Dillard's Chevron in Gurdon.

Q. Is the exit there off the Interstate?

A. Interstate 30.

Q. Interstate 30?

(T-347)

A. Yes, sir.

Q. Do you know Randy McArty?

A. Yes, sir.

Q. How do you know Randy McArty?

A. Well, he just lives down there.

Q. How far does he live, or how far did he live on July 31st, from your stationt?

A. About 2 miles.

Q. And that's down a gravel road?

A. Yes, sir.

Q. Did you have opportunity to see Mr. McArty on July th 31st of last year?

A. Yes, sir.

Q. What was the circumstances?

A. He come in and wanted to buy some shells, and I sold him 5.

Q. Do you remember what kind of shells they were?

A. I think they were number 1 buckshot.

Q. Does this look like the package that you sold to Mr. McArty?

A. Yes, sir.

Q. Is that buckshot?

A. Yes, sir, I think--

Q. Are you a hunter yourself?

A. Sir?

Q. Are you a hunter yourself?

A. Yes, sir.

Q. Was that deer season?

A. No, sir.

Q. How long did he stay in there when he purchased those?

A. About 10 minutes, 15.

[A portion of testimony omitted for sake of space.]

(T-349)

Q. Do you recall the time of day that was?

A. It was just in the evening. I don't know, 4--I'm going to say it

was at 4 or 5 o'clock, somewhere along in there.

STATEMENT OF AMY CHAMBERLAIN

(Taken by the Clark County Sheriff's deputies Pierce and Tackett August 3, 1992.)

PIERCE: Today's date is the 3rd day of August, 1992. The time is 1429. Present is myself, Mitch Pierce, and George Tackett with the Clark County Sheriff's Office, Josie Littles and Amy Chamberlain. Amy, how old are you?

AMY: Nine going on ten in November.

PIERCE: Okay. So you'll be ten in November. What day?

AMY: The fifth. I don't know the exact day.

PIERCE: The fifth or something like that? Okay.

AMY: I'll say the fifth.

PIERCE: Okay, Now I'm going to ask you some questions about something that occurred Friday night. Okay, I believe that your mom, her friend, Dan, and you were over at Lennie's house in

Okolona. Is that right?

AMY: Yes.

PIERCE: Did Randy McArty come over there? Okay. Who was with him?

AMY: His, he didn't have no way to go 'cause we had had the car. So his brother brought him over there in his brother's um truck.

PIERCE: Okay. What's his brother's name?

AMY: Bengie McArty.

PIERCE: Bengie McARty. Okay. And you all were in Randy's car. Right? And Randy took his car and left you all without any, a car. Is that right?

AMY: Yeah.

PIERCE: And how did you all get back to Randy's house?

AMY: Um, my momma's um friend Sam came and picked us up

PIERCE: Okay. And she carried you back to Randy's house. Okay. Where did you sleep that night?

AMY: I was asleep on the couch.

PIERCE: In the livingroom?

AMY: Yep

PIERCE: Okay. At some point in time, did you wake up?

AMY: Yeah.

PIERCE: What woke you up?

AMY: Um, Randy and my mom were, started arguing.

PIERCE: Could you hear what they were arguing about? You got to speak 'cause the tape recorder can't pick up head shakes.

AMY: Yeah.

PIERCE: Okay. What were they arguing about?

AMY: Randy had um got mad and hid my momma's car and she wanted to know where it was.

PIERCE: Okay. And Randy wouldn't tell her?

AMY: Yeah.

PIERCE: Okay.

AMY: That's correct.

PIERCE: Okay. How long did they argue?

AMY: I don't know but I woke up and um, I don't know, well I was asleep but um about. . . . .

PIERCE: Just a little while . . .

AMY: Three or four . . . .

PIERCE: A long time or what?

AMY: Just uh about four minutes when I was awake. Not too long . . . .

PIERCE: Okay. At some, what stopped the arguing?

AMY: Um, Randy shot my momma.

PIERCE: Okay. Did you see it?

AMY: No.

PIERCE: Okay. Were you still on the couch in the living room?

AMY: Yeah.

PIERCE: Okay. You heard a shot. What did you do?

AMY: Um, well whenever he had shot, he aimed I guess, and shot through a glass and shattered glass.

PIERCE: Okay. You heard a shot. What did you do?

AMY: Um, well whenever he had shot, he aimed I guess, and shot trough a glass and shattered glass.

PIERCE: But what did you do?

AMY: Then I waited until uh a few minutes and I went in there. I just barely looked and there was blood everywhere and glass. I didn't get off the couch. I just leaned over 'cause it's right there. The edge of it's just right there at the edge of the door.

PIERCE: Okay. Did you see anybody when you looked around?

AMY: Momma and Ben. He was um, she had got shot somewhere around her neck . . .

PIERCE : Uh huh.

AMY: And he was just holding her so she wouldn't bleed out too much more. Blood.

PIERCE: Okay. Before the shot, did you mother call out to anybody?

AMY: Yeah. She um, Dan was hid somewhere in the other room.

PIERCE: Uh huh.

AMY: There was a bunch of other rooms. I don't know which one it was but um she was saying, "Dan come here." Before, before, a little while before. She wanted Dan to come out there.

PIERCE: Okay.

AMY: 'Cause um earlier before um, Randy had left with the car, he um, Erma leaned through the window, I think to get something or something like that and um, he was hitting her head and she was bouncing up against the um . . . .

PIERCE: Who was hitting your mom's head?

AMY: Randy, I think she was trying to get something or something like that and she was bouncing and you know the door frame?

PIERCE: Uh hun.

AMY: The door was shut and she was bouncing in between that 'cause he was hitting her head. She was bouncing in the door.

PIERCE: Okay. So he was hitting her head and causing her head to hit the door frame? Okay. So Dan was somewhere else in the house. And you heard her say, "Dan come here" or something like that?

AMY: "Dan come on out." She was saying stuff like that. She wanted Dan to come out. 'Cause Lennie and Danny got mad because um, Randy had been um, it was like twelve o'clock sometimes, whenever we had left, whenever they got into fights and stuff and um Randy lea. . .Randy had made Lennie real mad 'cause he would constantly run by there, screaming, waking up all the neighbors and stuff and then finally one night um, we had left and um, Randy came down at the end of the block on the far side and uh, he started screaming "I just want to talk to my girlfriend" and um Randy had gotten mad and just let , let her lay. Didn't do nothing to her.

PIERCE: Okay. Had you ever seen Randy with a shotgun before?

AMY: Not unless he was putting it up or he had it moved because um, whenever momma'd usually go back with him 'cause he'd finally talk her into going back with her, with him.

PIERCE: Uh huh.

AMY: And so he'd move the shotgun all over but . . .

PIERCE: Over where?

AMY: He'd move it um so my mom would have to hold it. He'd move it like, lay it down in the floorboard, try to lay it down in the floorboard.

PIERCE: In the car?

AMY: Or the truck. Before he . . . .

PIERCE: Or the truck.

AMY: Before he totaled it out.

PIERCE: Before he totaled it out. Okay. Had the gun, when you all were riding around that day, was the gun in the car? You know where the gun was?

AMY: Um, it . . . .

PIERCE: Did you see the gun?

AMY: no but he always puts it on his side of the bed. The nightstands on that side of the bed . . . .

PIERCE: Yeah.

AMY: His side and it always sits right there.

PIERCE: Okay.

AMY: With the handle down.

PIERCE: Okay. Um, that will conlcude this statement. The time is 1438.

(Whereupon there was a brief pause in the proceedings.)

PIERCE: This is reopening the statement. Time is 1442. Okay, Amy, earlier I'd asked you a question before we turned the tape recorder on. You, I believe you said that Dan told you to go get help. Okay. What did you do?

AMY: Um, uh, I don't . . . He had told me to come into the kitchen

and I was holding my nose 'cause there was blood everywhere and it started stinking real bad and so um, I was holding my nose and um he told me to go get help and the door, it takes awhile to shut and um so I said, "Okay" and I, I told him I'd get on my bike and ride down the queickest way and so I got on my bike and I had turned it around and then it ain't got no Night light on it so um, so I rode my bike down to the neighbors and I was looking at the um, there's barbed wire fences

. . .

PIERCE: Uh huh.

AMY: And stuff like that that um go down and stuff and I was, I didn't ever look down. I was just looking on the side trying to keep in the road.

PIERCE: Okay. And where did you go?

AMY: Uh, I went down to the, I went down to the neighbors.

PIERCE: Okay. And what did you do when you got to the neighbors house?

AMY: Uh, before um, Randy had beat me down there and he had told the, he had woke them up and told the neighbors what he had done and um, then um, he was in the house or something I guess.

PIERCE: Now, now wait, now wait. You're getting ahead of me. Back up. You got to the house and what did you do?

AMY: Before I got to the house um this truck was leaving out and I had told them that Randy had shot my mom and um, I kept on sliding down and I scratched my knee all up and then um . . .

PIERCE: Where, where where was the truck at? Was it on the road?

AMY: Yeah. They had just pulled out and hit gravel.

PIERCE: From the neighbor's house?

AMY: Yeah. Yeah, they had pulled out and um . . .

PIERCE: Okay and you rode on up to the neighbor's house?

Amy: No. My brake had, the gravel and the concrete hit, meet and my bike had slid down the front tire had slid down just before it hit gravel and they told me tho just leave the bike there and run up there

so I ran up there.

PIERCE: Okay. What did you do when you got up there?

AMY: I told them that my momma got shot and they said they know 'cause it, and then I noticed that Randy had beat me up there.

PIERCE: Okay. Was Randy in the house?

AMY: I don't know.

PIERCE: Did you see Randy?

AMY: Later.

PIERCE: Later. Okay. Now, let me back up another step. When you left out of the house, was Randy's car still at the house?

AMY: Yeah.

PIERCE: Were the headlights on it?

AMY: Yeah.

PIERCE: Okay. Now, we'll go back to the neighbor's house. You told them that Randy had shot your mom.

AMY: I told them that my mom had got shot and they said, "I

know." 'Cause Randy had went up there and told them that he had shot her.

PIERCE: Okay.

AMY: So they knew.

PIERCE: Did you make a statement saying that something to the effect that your mom had tried to stab Randy with, or cut him with a butcher knife?

AMY: No.

PIERCE: And that Randy shot him, shot her?

AMY: No. She just had it in her hand.

PIERCE: did you see the knife?

AMY: No.

PIERCE: You didn't see a knife?

AMY: No. I didn't look for any knife or the gun or nothing.

PIERCE: Okay. Alright. But how, who told you that your mom had a knife?

AMY: Nobody had told me earlier before. . . .

PIERCE: No at the house. Did you hever make the statement that your mom had a knife? Did you ever tell anybody that you mom had a knife?

AMY: When I had got down there and they had let me in they said, "well what happened? " and I told them what had happened that she had a butcher knife in her hand.

PIERCE: You told them that?

AMY: Yes.

PIERCE: Okay. Did you ever tell them that you mom had tried to cut Randy?

AMY: No.

PIERCE: Did you tell them that he had tried to stab her? Or she had tried to stab him?

AMY: Um, no.

PIERCE: Okay. Now you, you had said earlier that you had heard

you mom in the kitchen in the silverware drawer.

AMY: Yes.

PIERCE: And that you thought she got a, because of that you thought she had gotten a knife out of the drawer.

AMY: Um, it sounded like she got something out of there.

PIERCE: She got, she got something out of there. Okay. But you dOn't know what it was? And you never saw a knife?

AMY: I never looked for one.

PIERCE: You never looked for one. So you never saw one.

AMY: No.

PIERCE: And you never saw the gun.

AMY: No. I never looked for it neither.

PIERCE: Okay. That will conclude this. Time is 1448.

INTERVIEW WITH LENNIE RICHARDS

PIERCE: Today'S date is the 8th day of August, `992. The time is 8:32. Present is myself, Mitch Pierce, Criminal Investigator for the

Clark County Sheriff's Office and Lennie Richards. We're at the Gurdon Police Department. Okay, Lennie, on the 31st of July, which was a Friday, did you have occasion to see or come in contact with Teresa Chamberlain?

RICHARDS: Yes sir I did twice.

PIERCE: Okay. When you saw her, who was with her?

RICHARDS: Her daughter was with her and a boy from Louisiana, Dan.

PIERCE: Daniel?

RICHARDS: Daniel.

PIERCE: Okay. Did you know Daniel's last name?

RICHARDS: No, I didn't.

PIERCE: Okay. Okay, you said you saw them twice. The first time you saw her, what were, where were they and where were you and what was said?

RICHARDS: Well, I was in Okolona store and Teresa come in and

she says, "Lennie I'm going to Delight, do you want to go with me? " I said, "Well, I can't stay gone too long but I will." So I went out there and . . .and she wanted me to drive so I drove over to Delignt and then we come back to the Okolona store. We was gone about an hour.

[Non-relevant material omitted.]

PIERCE: Okay. Then what happened?

RICHARDS: When we got to the Okolona store, she let me off and she told me, she says, "We're going to the river and cool off a little bit." And I said, "Okay, well I'm going to the garden." And I went to the garden, me and my neighbor, and worked in the garden for a good long while, over an hour, and on the way back from the garden is when I seen her the second time. And she stopped me, she was in her car and I was in my truck and she said she was going to my house and I told her okay I'd be there in just a few minutes, I had to get something at the store. And when I got, I went to the store and got

what I needed, then I come back to my house. It was getting pretty close to seven o'clock then and uh, when I drove up, her car was in the driveway and she was pulling all her clothes and possessions out of ti and Randy McArty was there, him and his brother, they was in, in Randy's brothers picup, and Randy and Teresa were arguing. And uh, I just stood there at the back of my truck at the tailgate. I didn't say nothing or do nothing at that point and then Randy got ready to leave and he grabbed Teresa with his left hand and jerked her into the car and he had his right hand doubled up and he was fixing to hit her so uh, when I seen that, I went from the tailgate of my pickup over to his car and he turned her loose when he seen me coming over there and he jumped over there in the passenger side of the car and used his foot to give it gas and backed out thataway where I couldn't get to him. And he left.

HEARING ON RULE 37 PETITION

June 6, 1994

Hon. W.H. "Dub" Arnold, presiding

TESTIMONY OF BOBBY WAYNE SANDERS

DIRECT EXAMINATION

BY MR. MCARTHUR:

(T-44)

Q. Would you state your name, please sir?

A. Bobby Wayne Sanders.

Q. And you're an attorney here in Arkadelphia?

A. Yes, sir.

Q. Former prosecuting attorney?

A. Yes, sir.

Q. And what years did you serve as prosecuting attorney?

A. '91- '92.

Q. On the 31st day of July, 1992, there was an incident involving Randall McArty and Teresa Chamberlain at the home they shared here in this county; is that correct?

A. That's correct.

Q. And as a result of that incident, you caused to be filed charges against Randall mcArty; is that correct?

A. That's correct.

(T-45)

Q. And what were those charges? Do you recall?

A. To the best of my recollect, it was murder in the first degree.

Q. Did you continue actively prosecuting that case from the date shown--or filing as August the 4th, so I assume that would be about right--from that day until you left office?

A. Yes, sir, it was under extensive investigation. There was a number of forensic type things that had to be done, and Detective Mitch Pierce was working on it quite diligently throught the summer

and fall of '92.

Q. Travis Mathis Sr. was representing Mr. McArty at all times throughout the time you were in the case; correct?

A. Yes, sir, I believe so.

Q. At some point, prioer to your leaving office, did you have one or more conversations with Mr. Mathis concerning a possible plea or making an offer of plea to Mr. Mathis for Mr. McArty?

A. Yes.

Q. Could you tell the Court about that?

A. Well, this is--I can't remember the exact time, but late summer/early fall when the cases were coming up for trial settings, we talked on the phone.

Q. Do recall what offer you made in Mr. McArty's case?

A. Yes, sir.

Q. Tell the Court what that is, please.

A. I talked to Mr. Mathis. At that time, all of the evidence that was

later completely developed, was not in my hands nor, I believe, in the

(T-46)

hands of Mitch Pierce, and it appeared to be a situation in which there was, I believe, a shotgun or some type of rifle type weapon involved in which the victim was killed. And there was also evidence of a knife being either involved or in the hands of the deceased, as I recall, and the evidence relating to a pure first degree, at that time seemed to be a little shaky. And I talked to Mr. Mathis on the phone about that one day. We were discussing it, and previous to that, I believe in November or December--I believe November of '91--we'd had a very similar case, a case involving a man named Virgil Mitchell, which the same sort of thing had happened. We had filed first degree murder and then, you know, the evidence, as it quite often does, did not really stack up to that, and I'd offered him a second degree murder and a 20 year sentence in the Mitchell case back several months before. In our discussions, I told Mr. Mathis on the phone,

I said, "You know, this case has got some jproblems. It looks to me like it's got some problems, and I'll do the same thing for your client that I did for Virgil Mitchell," which was reduce it to second degree murder with the 20 year sentence.

Q. Did you ever hear back on that offer?

A. Well, we discussed it on the phone that day, and perhaps even, I think, we had talked about it one other time on the phone.

(T-47)

Q. Did he ever decline the offer you'd made?

A. Well, of course, certainly in all fairness to Mr. Mathis, I never made this offer in writing, you know. This was a discussion between he and I on the phone, and he indicated that it wouldn't do me any good to make such an offer. That he felt like he had a bona fide defense to the case, and that the only as best I recollect, the only thing he would consider would be some kind of plea bargain where Mr. McArty wouldn't go to jail.

Q. Do you know whether or not he ever communicated this plea offer to his client?

A. I have no earthly idea.

Q. Now you say it wasn't in writing, but you made a bona fide plea offer, correct?

A. Well, I told him what I would do. I told him literally what I would do. That I felt like it was in the same category as this previous case. The evidence was very similar--not similar, but the evidence had the same quality and character about it, at that time. Now later on, based on the diligence of Mr. Mitch Pierce and I assume also the new prosecutor, they developed other evidence that at that time, I was not privy to--some blood spatter expert. In fact, I listened to most of the case, and it was quite impressive, but I didn't have that report on my desk at the time I made this offer of second degree and 20 years.

Q. Let's say, for example, if the following day, after this offer had

been made, had Mr. Mathis called you and said, "Mr.Sanders, I talked to my client. We'll accept your plea offer," would you have gone aheade and made that plea offer, or that recommendation, to the Court in this case?

A. Yes. Yes.

[CROSS EXAMINATION OMITTED]

TESTIMONY OF TRAVIS MATHIS, SR.

[Excerpt of Cross-Examination]

(T-79)

Q. In the decision of what witnesses to call, I'm sure you discussed with him [McArty] people he knew that might know some things about the man that was in the house the night of the killing, about the girl, the woman that was the victim, and all that. You discussed all that and what information he could give them?

A. Correct. Yes.

Q. Then when you called your witnesses--like you say, you called a

number of witnesses that you did not call to testify.

A. Right.

Q. And that, you say, was the basis, in the trial, was strategy. You determined that they could harm you more than they could help you. Is that what you're saying?

A. Yes, that was my final decision and the reason that I didn't use them.

Q. Right. I understand that. The child, she was an eyewitness to what happened there that night; was she not?

A. No, she was in the next room, and she was awakened by the noise, and then when she came into the room, I believe there was blood everywhere, and she ran up to the McMillan's. I believe she started out on her bicycle, and then it went in the ditch, and she ran on up there, and the McMillans are good reliable citizens. And it was my contention that their testimony, in regard to what she related to them, was admissible on the ground that they were excited utterances

of the child at the time of the occurrence, and therefore, admissible. And I felt that any testimony that she might give, would detract from the strength of the testimony, as related by the McMillans.

Q. Did you ever interview the child?

A. I certainly did not.

Q. Did you ever attempt to?

A. I did not.

Q. Then how do you know her testimony would not have been helpful?

A. I don't know that. I wouldn't have known that had she told me information that I might of considered helpful because she was with the family of the victim from the time of this incident until the trial, and I didn't know what to expect from an 11 year old child.